INDEX.

	PAGE
Opinions below	2
Jurisdiction	2
The Questions Presented	2
Statutes and Rules Involved	6
With respect to the question of Discovery	6
With respect to the Rules of Navigation	7
Statement	9
Reasons for Granting the Writ	14
As to the First Question Presented	15
As to the Second Question Presented	17
Conclusion	20

CITATIONS

Cases.

PAGE

Alcoa Rambler, 82 Ll. L. R. 359, 367 ..... 18, 19

Bank Line, Ltd. v. *United States*, 163 F. (2d) 133 76 F. Supp. 801 15

Hickman v. *Taylor*, 329 U. S. 495, 507 ..... 5, 14, 15

Lind v. *United States*, 156 F. (2d) 231, 233 ..... 18, 19

United States v. *The Australia Star*, 172 F. (2d) 472 18

Statutes.

Suits in Admiralty Act (46 U. S. C. 741, 743) 6
Public Vessels Act (46 U. S. C. 781, 782) 6
Admiralty Rule 32 providing for Discovery, etc. 7

International Rules of the Road

Regulation lights for steam vessels (33 U. S. C. 72, Art. 2 a, b, c and e) 7

Starboard Hand Rule (33 U. S. C. 104, 106, 107, 108) 8

General Prudential Rule, known as the Rule of Special Circumstances (33 U. S. C. 112) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

PACIFIC-ATLANTIC STEAMSHIP CO.

and

E. J. LAVINO & COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

The Petition

of

PACIFIC-ATLANTIC STEAMSHIP CO., as owner of the American Motorship *Oregon* for exemption from or limitation of liability.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioners above named, by their respective counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled suits on June 9th, 1949.

Opinions Below.

The opinion of the United States Court of Appeals (R. 529) has not yet been officially reported, but is unofficially printed at 1949 A. M. C. 1120. The opinion of the District Court for the Eastern District of Virginia (R. 31) is reported at 81 F. Supp. 777.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The judgment of the Court of Appeals was entered on June 9th, 1949 (R. 544). Thereafter, and within the time permitted by the Court of Appeals, your petitioners herein presented to that Court a petition for rehearing, which was denied by order of the Court entered August 4th, 1949 (R. 558).

The Questions Presented.

This litigation arose out of a collision which occurred, in darkness, on the early morning of December 10th, 1941, between the American merchant vessel *Oregon* and the United States battleship *New Mexico* in the Atlantic, about 40 miles south of Nantucket Shoals Lightvessel, and which resulted in the total loss of the *Oregon,* the loss of life of 17 of her men, the loss of her valuable cargo, and substantial damage to the *New Mexico.* Your petitioner, Pacific-Atlantic Steamship Co., owned the *Oregon,* and your petitioner Lavino owned a valuable portion of her cargo.

When the *Oregon* and *New Mexico* first became aware of each other's presence, they were each proceeding at approximately the same speed of 14 knots, without show-

ing any lights, pursuant to instructions broadcast by radio by the Navy Department shortly after "Pearl Harbor." The *Oregon* turned on her navigating lights immediately upon sighting the unlighted loom of the battleship off her starboard bow. The *New Mexico* was being escorted and "screened" by three United States destroyers, the *Sims, Hughes* and *Russell;* and although the watch officers of the *Sims* and *New Mexico* had had the *Oregon* under observation, through powerful binoculars, for a substantial time before the *Oregon's* men saw the unlighted battleship, the *New Mexico* and her escorts did not turn on their navigating lights when they first sighted the unlighted *Oregon* nor for a substantial period after the *Oregon* had lighted hers.

The *Oregon's* master and wheelsman, who were the only surviving members of her deck watch, testified that when the *New Mexico's* lights came on she was seen to be approaching on a crossing course, at high speed, although neither her exact course nor her real speed could be determined instantly from her lights, and that she and the *Oregon* were then in such close quarters and in such immediate danger of collision that the Rule of Special Circumstances applied, calling for immediate avoiding action by both vessels; and the master of the *Oregon,* in the exercise of his best judgment, continued at full speed with hard left rudder, in an effort to swing away from or parallel the oncoming battleship (R. 88, 91-97, 107, 110-113).

Many of respondent's witnesses herein and certain records from the *New Mexico* and the destroyer *Hughes* confirmed that the *Oregon* and the battleship were in close quarters and in the jaws of collision when the *New Mexico* turned on her navigating lights (R. 192-193, 203, 208, 210, 229, 230, 233, 236, 241, 306, 312). But the navigating officers of the *New Mexico* contended that when the battleship

turned on her lights (following the *Oregon's*), the two vessels were not in close quarters and were still so far distant that the Starboard Hand Rule applied, making the *New Mexico* the "privileged" vessel and justifying them in holding course and speed until an estimated 60 seconds before collision, when the engines were reversed and the rudder put hard right, too late to avoid the disastrous collision.

The trial of the case was stayed, by order of the District Court, for the duration of the war, and no testimony herein was taken by respondent until the early part of 1946. But, in December 1941, a few days after the collision, a Naval Court of Inquiry investigating the collision in secrecy, obtained the evidence of a large number of witnesses from the *New Mexico* and her escorting destroyers. During the course of the case at bar in the District Court, respondent disclosed certain portions of the factual record of the Naval Court's investigation, but declined to disclose the balance thereof, which contained the evidence of a number of "key" witnesses, who were *not* offered as witnesses in this litigation: and there were developments before the Court of Appeals which strongly indicate that the undisclosed portion of the Naval record contains evidence which would throw much light upon the facts of the collision and would discredit the respondent's case.

Your petitioners presented motions to both the District Court and the Court of Appeals for an order directing respondent to discover and show to your petitioners the complete factual record of the investigation by the said Naval Court of Inquiry. The District Court denied the motion so made to it (R. 12-13; 491-492); and its rulings were affirmed, apparently on a basis of "privilege" without any mention or ruling by the Court of Appeals with

reference to the separate motion for Discovery pending before it (R. 535).

Having declined to order the respondent to make Discovery of all of the factual information in the record of its investigation by its Navy Department, the Trial Judge found that the *New Mexico* turned on her lights when she and the *Oregon* were 1500 to 2200 yards apart, that the normal Starboard Hand Rule applied, despite the failure of the *New Mexico* to turn on her navigating lights sooner, and that, therefore, the *New Mexico* was justified in holding her course and speed until too late to avert collision (R. 75-78). The *Oregon* was thereupon held solely liable, because of faulty lookout, failure to blow a "rudder" whistle when she went hard left, and failure to keep clear of the *New Mexico* in accordance with the normal requirements of the Starboard Hand Rule (R. 78). The Court of Appeals, affirming the findings and conclusions of the District Court, held that the Starboard Hand Rule applied when the *Oregon* sighted the unlighted vessel on her starboard bow and *before* the *New Mexico* turned on her lights.

Your petitioners now present to this Court the following questions:

FIRST: Did not the Court of Appeals err in failing to order a Discovery of the complete factual record of the Naval Court of Inquiry, and was not its decision in conflict with the principles of law stated by this Court in *Hickman* v. *Taylor,* 329 U. S. 495?

SECOND: Did not the Court of Appeals err in holding (*contra* to decisions in the Second Circuit), that the Starboard Hand Rule applied before the *New Mexico* turned

on her lights, and also in holding that that Rule applied when the *New Mexico* belatedly turned on her lights, in spite of her delay in showing them, thus making the *New Mexico* the "privileged" vessel, and justifying her in holding her course and speed; and was not the situation governed by the Rule of Special Circumstances, under which both vessels were required to take prompt avoiding action by alteration of course or speed?

Statutes and Rules Involved.

With respect to the question of Discovery:

Your petitioners' suit against the United States was brought under the Act of March 3rd, 1925, known as the Public Vessels Act. 46 U. S. C. 781 *et sequi.* Section 2 thereof (46 U. S. C. 782) provides, in part, as follows:

> "Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'an Act authorizing suits against the United States in admiralty, suits for salvage services, * * * and for other purposes' approved March 9, 1920, or any amendment thereof, insofar as the same are not inconsistent herewith, * * *"

The Act of March 9, 1920, known as the Suits in Admiralty Act, 46 U. S. C. 741 *et sequi,* provides in Section 3 thereof (46 U. S. C. 743), in part, as follows:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

Admiralty Rule 32 provides as follows:

"DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action, and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

With respect to the Rules of navigation:

The statutory International Rules of the Road, 33 U. S. C. 62 *et sequi*, contain the following provisions:

"(33 U. S. C. 72) Art. 2. A steam vessel when under way shall carry (a) On or in front of the foremast * * * a bright white light * * * so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles."

"(33 U. S. C. 72). (b) On the starboard side a green light so constructed as to show an unbroken

light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

"(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

"(33 U. S. C. 72). (e) A steam vessel when under way may carry an additional while light similar in construction to the light mentioned in subdivision (a). * * *."

"(33 U. S. C. 104). Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

"(33 U. S. C. 106). Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

"(33 U. S. C. 107). Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"(33 U. S. C. 108). Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"GENERAL PRUDENTIAL RULE"

"(33 U. S. C. 112). Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."*

STATEMENT.

The distance between the vessels when the *New Mexico* belatedly turned on her navigating lights is a crucial question in determining the liabilities for this disastrous collision. By turning to the right when the unlighted *Oregon* was first seen, or even when the *Oregon* turned on her lights, the *New Mexico* would have turned *away from* the approaching vessel, and would have avoided the collision, no matter what the *Oregon* did; and unless the distance when the *New Mexico* turned on her lights was sufficient to bring the Starboard Hand Rule into effect, she had no right in law to hold her course and speed as she admittedly did, and she was guilty of contributory negligence under the Rule of Special Circumstances for not taking timely avoiding action. That negligence of the *New Mexico* is a question quite apart from any negligence on the part of the *Oregon* with respect to what she did.

Consequently it was of the utmost importance to the just determination of the liabilities herein that all of the

* The "General Prudential Rule", as its language indicates, relates to any situation necessitating a departure from the other rules, and it is commonly referred to as the Rule of Special Circumstances. Under that rule, each vessel involved must take the prompt and proper action necessary to avert disaster, and neither vessel has any "privilege" or right of way.

Articles 19 and 21-23 contain the provisions which, together, are commonly referred to as the Starboard Hand Rule.

available proofs with respect to this question of distance be produced. It was even more important, in that the loss of life resulting from the collision had deprived the *Oregon* of the evidence of her watch officer and lookout.

There is evidence in the record herein that the commanding officer and watch officer of the *Sims* and the commanding officer of the *Hughes* admitted in their official reports, or in their testimony to the Naval Court, shortly after the collision, that, although the unlighted *Oregon* had been sighted through binoculars at a distance of about 4000 yards, she was permitted to cross the *Sims* and get inside the "screen" without being "challenged" or otherwise warned of the approach of the Naval flotilla, and that the *Oregon* was *inside* the "screen" when she turned on her lights (R. 246-247, 308, 310, 321). Aside from the destroyers' breach of their duty to prevent a possible collision by keeping all vessels outside of the "screen", as admitted by Admiral Ainsworth (R. 282-284, 286), the significance of those admissions is that the "screen" was formed on the arc of a circle with a radius of 2000 yards from the battleship (R. 34), and, therefore, when the *Oregon* turned on her lights *inside* the "screen", the distance between her and the *New Mexico* must have been less than 2000 yards and must have been still much less when the *New Mexico* turned on her lights later.* Those admissions were not referred to by the Trial Judge or by the Court of Appeals.

There is also every reason to believe that certain "key" Navy witnesses examined by the Naval Court of Inquiry (who were not called in this litigation) such as the watch officer of the *Hughes*, the officer in charge of the

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* The *Oregon's* course of 340° true and the *New Mexico's* course of 216° true were converging at an angle of 124°, so that, at their respective speeds of approximately 14 knots, the distance between them was closing at a rate of about 824 yards per minute.

watch on the *New Mexico's* Flag Plot bridge, and the *New Mexico's* quartermaster and his assistant on her navigating bridge (R. 517-518) were interrogated and testified with respect to this important question of distance. Indeed, the respondent admitted before the Court of Appeals that the watch officer of the *Hughes,* who should have had reliable knowledge of the facts, told the Naval Court that the *Oregon's* lights came on when she was about 500 yards from the *New Mexico* (R. 518-519, 497-498). No such disclosure was made to the District Court.

Thus, there are most cogent reasons for a strong assumption that a disclosure of the complete Naval record, and the development of further proofs therefrom, would have thrown much light on this important question, and might have called for a finding that when the *New Mexico* turned on her lights to show her course and speed, the vessels were in close quarters, much less than 1500 yards apart, and not much more than about 60 seconds from collision, as the *Oregon* contended.*

Not long after the original libel and the answer thereto had been filed, a motion was presented to the District Court for discovery of the factual record of the Naval Court of Inquiry. It was denied by Judge Way in an order entered June 15, 1942, (R. 8-13) without any written statement of the reason for that denial. Remarks made by the Judge during the argument of the motion indicated his feeling that a Discovery should be denied lest, in the existing hostilities, it be injurious to the public interest. When respondent took its first depositions at San Francisco in 1946, your petitioners demanded production of the Naval record.

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* The variations in the Trial Judge's several references to this question of distance indicated difficulty in making his finding,—a difficulty which might have been eliminated by a Discovery of the complete record of the Naval Court. (R. 57, 60, 62, 75.)

Respondent's counsel first refused the demand but, after telephone conferences with the Department of Justice at Washington, stated that as each witness for respondent was called a copy of his testimony to the Naval Court of Inquiry, if any, would be produced. The Court of Appeals, in its opinion, commented that that arrangement was apparently satisfactory to your petitioners (R. 535). That comment is misleading. The arrangement *had* to be accepted at that stage of the proceedings because of Judge Way's earlier order; and the record shows, in the colloquy between counsel, that the acceptance of the arrangement was entirely without prejudice to the rights of the petitioners to renew their motion to the Court for a discovery of the complete record.

The motion was renewed to the District Court, during the trial before Judge Paul. Respondent did not then, or at any time in the District Court, disclose all of the witnesses who had been examined by the Naval Court of Inquiry but it was known that they included at least one or more "Key" witnesses whom respondent had not called to testify in the case at bar (R. 209, 277-278). Judge Paul, in his discussion of the motion, indicated that he denied it because he regarded it as an unjustifiable "fishing excursion" by your petitioners (R. 491-492).

As soon as possible after your petitioners had filed their appeal to the Court of Appeals, they presented to that Court a motion for an order requiring the respondent to produce and discover the complete factual record of the Naval Court of Inquiry and permitting your petitioners to reopen the record and offer to the Court of Appeals such new and material evidence as might be made available by the said Discovery (R. 480). After the argument of that motion in November 1948, the Court of Appeals ordered

that the motion be continued for determination on the final argument of your petitioners' appeal to that Court (R. 527). In its opinion, after final argument, the Court of Appeals affirmed the denial of the motions in the District Court apparently on the ground that the Naval record constituted a privileged document (R. 535). But the Court of Appeals, in its opinion, made no mention of and did not specifically rule on the separate motion which had been presented to it, and which was still pending, under its order of continuance, at the time of the final argument of the appeal.

The senior and junior watch officers of the *New Mexico* sighted the unlighted *Oregon*, through their binoculars, several minutes before the *Oregon's* limited personnel, without the aid of glasses, sighted the unlighted *New Mexico*. In violation of their standing orders, the battleship's watch officers did not immediately summon her captain to the bridge. They wasted precious minutes discussing between themselves and the Supervisory Head of the Watch the possibility that they were looking at another U. S. Naval vessel standing up to join their flotilla (R. 141, 154-157, 187, 196-197, 211-212). There is no indication that their battle stations were alerted, and their discussions with each other did not indicate that they feared the presence of an enemy vessel. Yet they did not turn on their navigating lights. The senior watch officer admitted that when he himself finally left his station on the bridge and went aft to waken the captain, no thought had been given to turning on the *New Mexico's* navigating lights. Even after the *Oregon* showed her lights, there was delay in switching on the battleship's until the *New Mexico's* quartermaster suggested the necessity of doing so (R. 174-175, 316).

The *New Mexico's* captain, awakened from his sleep, arrived on the navigating bridge about 30 seconds after

both ships were lighted (R. 40, 198, 533). His senior watch officer, who knew how the situation had developed, suggested an immediate alteration of course to the right to avoid the impending collision, but the captain delayed his avoiding action while looking at the *Oregon* through his binoculars. The captain testified that he thought that the Starboard Hand Rule applied, and therefore held his course and speed. He thought that he finally took his avoiding action about 1 minute before collision, but evidence from the battleship's engine room shows that the avoiding action was taken much less than 60 seconds before collision, and the ultimate event proved that the avoiding action was taken too late (R. 125, 137-138, 149, 158, 177, 180, 181).

Your petitioners believe that, in such circumstances, the *New Mexico*, having withheld her navigating lights after sighting the unlighted *Oregon*, could not be permitted, in law, to set up a Starboard Hand Rule situation, in her own favor, by belatedly switching on her lights, even at the distance found by the lower Courts, and that there is serious error, in law, in the holding by the Court of Appeals that the Starboard Hand Rule applied even *before* the *New Mexico* turned on her lights. The situation was governed by the Rule of Special Circumstances, and the captain and navigating officers of the *New Mexico* were negligent in not appraising the situation properly and in not taking prompt avoiding action, in time for it to be effective.

Reasons for Granting the Writ.

With respect to the Questions now presented herein, the decision of the Court below is in conflict with the decision of this Court in *Hickman* v. *Taylor*, 329 U. S. 495, and is in conflict with decisions in the Second Circuit.

Quite apart from their serious importance for the parties to this litigation, both of the Questions presented are of serious and far-reaching importance to the Merchant Marine of the United States. They have already arisen in other cases and will undoubtedly arise again in cases of a similar nature, and the decision of the Court below should be reviewed by this Court, in view of the confusion which that decision has now created.

As to the First Question Presented:

The failure of both of the lower courts herein to order a Discovery of the complete factual record of the investigation made by the Naval Court of Inquiry is in conflict with the principles of law laid down by this Court in *Hickman* v. *Taylor*, 329 U. S. 495, in which this Court said at p. 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

The case of *Bank Line Ltd.* v. *United States*, 163 F(2d) 133; 76 F. Supp. 801, involved circumstances and reasons closely similar to those involved in the present litigation, for ordering Discovery of those portions of the factual record of a Naval Court of Inquiry which had not already been disclosed. The District Court's order, directing a Discovery, was not officially reported but is printed in

1946 A. M. C. 660. The Court of Appeals, Second Circuit, 163 F(2d) 133, denying the Goverment's petition for a writ of prohibition or mandamus, set forth specific suggestions for the consideration of the District Court in the event of further proceedings for the enforcement of its order, and in the course of those suggestions stated that the undisclosed factual portions of the Naval record contained "testimony which would have to be furnished by the Government if it were a private litigant" (pp. 136-137), and indicated that denial of a Discovery thereof would be justified only if the Government showed sufficient grounds to establish that the Naval record should be regarded as a privileged document (pp. 138-139). Thereafter, the District Court, upon consideration of the suggestions of the Court of Appeals, concluded that the Government, having disclaimed considerations of military security as a reason for opposing the Discovery, was merely objecting to interference with the Navy's "housekeeping", and that the order for Discovery should be enforced (76 F. Supp. 801, 803). Your petitioners are informed that the *Bank Line* case was then settled, thus eliminating the Discovery.

In the case at bar, respondent showed nothing materially different from its showing in the *Bank Line* case to support its opposition to a Discovery of the complete factual portions of the Naval record (R. 514, 521-526). It is apparent from the record herein and the opinions in the *Bank Line* case that respondent's opposition is naively based on an argument that it would be embarrassed in its investigation of Naval disasters of this type, if it were compelled to disclose facts uncovered by its investigation tending to indicate liability of Naval vessels.

If the *New Mexico* had been a merchant vessel, owned and operated by the United States, the facts of the colli-

sion would have been investigated by the United States Local Inspectors (whose duties have now been taken over by the Coast Guard), and the complete factual record of such an investigation would have been made public. The investigation of the present collision by a Naval Court of Inquiry was of no different character and no good reason appears why the Navy should claim the right to make such an investigation in secrecy and withhold the facts so ascertained. Respondent has not suggested, and petitioners believe that it cannot suggest, that, after the termination of hostilities, a full disclosure of the Navy's investigation of the facts involved in this collision could in any way be prejudicial to the national security (R. 514).

By the statutory provisions of the Public Vessels Act under which your petitioners are suing respondent, the suit should be heard and determined "according to the principles of law and to the rules of practice obtaining in like cases between private parties"; and in the *Bank Line* case, *supra,* the Court of Appeals, Second Circuit, pointed out that the Discovery would be compelled if the suit were between private parties. A strong inference seems to be inescapable that respondent, having unexplainedly failed to produce herein certain important witnesses who were examined by the Naval Court of Inquiry, refused and opposed a Discovery of the undisclosed factual portions of the Naval record because they contain facts which, if disclosed, would be helpful to your petitioners and harmful to respondent's defense.

As to the Second Question Presented:

The Court of Appeals held that the Starboard Hand Rule applied when the *Oregon* saw on her starboard bow the unlighted *New Mexico,* and that the *Oregon* was under a

duty to keep out of the way *before* the *New Mexico's* lights came on (R. 541). That is in conflict with the Second Circuit cases of *Lind* v. *United States,* 156 F. (2d) 231, 233, and *United States* v. *The Australia Star,* 172 F. (2d) 472, 474.

In all situations in which any of the Rules of the Road place upon one vessel a "burden" to keep clear of a "privileged" vessel, it is self-evident that the "burdened" vessel must have accurate information in ample time to know what the course, speed and apparent intention of the "privileged" vessel may be, and, at night, such information can be furnished only by a display of the navigating lights prescribed by the Rules. In the *Lind* case, *supra,* the Second Circuit said: "Although the *Doubleday* was on the *Mary's* starboard hand, the case was one of 'special circumstances' for all navigation rules presuppose that both vessels shall be in sight of each other and can continually check each other's positions." In the *Alcoa Rambler,* 82 Lloyd's List L. R. 359, Lord Wright, speaking for the Privy Council, said, at page 367, that the "burdened" vessel "must be in a position to appreciate what the situation is and to know what the other ship is doing and whether it is on a course at all, or, if so, on what course." No such information or knowledge was available to the *Oregon* before the *New Mexico* showed her lights. In the darkness, the Master of the *Oregon* could not tell whether the unlighted vessel on his starboard bow was moving away or approaching, and could not determine her course and speed with respect to his course. The holding of the Court of Appeals is not only in conflict with the decisions of the Second Circuit but is contrary to the plain intent of the International Rules of the Road, and is of such far-reaching importance that the case should be reviewed by this Court.

For similar reasons, the Starboard Hand Rule did not apply when the *New Mexico* belatedly turned on her lights after withholding them for the substantial period that she had had the unlighted *Oregon* under observation. The present International Rules of the Road were adopted and enacted into our statutory law in 1890 (33 U. S. C. 62 *et sequi*). The International Conference which framed the Rules, despite the generally slower speed of steam vessels at that time, considered that, in clear weather, at night, the *minimum* information of a vessel's course and speed, to furnish adequate time for the avoidance of collision, should be furnished at a distance of 5 miles by the white masthead lights and 2 miles by the colored side lights. (33 U. S. C. 72(a) to (e), page 7 *supra*). All other provisions of the Rules involving "burdens" and "privileges" presupposed a display of the required lights, to furnish the necessary information of course and speed, at night, at the minimum distance stated.

Even though the "blackout" orders broadcast by the Navy Department licensed the vessels in the present case to proceed without showing the navigating lights required by statute up to the moment when each first became aware of the other's presence (as the parties herein stipulated in the District Court), it is undisputed that when each first saw the unlighted loom of the other they were far inside of the minimum distance at which navigating lights would normally furnish the information necessary for safe navigation. A belated display of lights could not furnish instantly the information necessary to bring the Starboard Hand Rule into effect, because accurate knowledge of course and speed could be obtained only by watching the lights for a further period of time, as indicated in *Lind* v. *United States* and the *Alcoa Rambler, supra.* The vessels were closing at 824 yards per

minute, and a belated display of the *New Mexico's* lights, even at 1500 to 2200 yards, did not meet the requirements of the Starboard Hand Rule. The situation was governed by the Rule of Special Circumstances.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

Pacific-Atlantic Steamship Co.

By Robert S. Erskine

Counsel.

E. J. Lavino & Company

By Leonard J. Matteson

Counsel.

Dated: New York, September 6th, 1949.